



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 27, 2017 Government Records Council Meeting

Kevin Alexander
Complainant

Complaint No. 2016-191

v.

NJ Department of Corrections
Custodian of Record

At the June 27, 2017 public meeting, the Government Records Council (“Council”) considered the June 20, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s response to the Complainant’s OPRA request was timely because the GRC concludes that the Custodian responded in writing to the request, denying access, on the same date the request was received. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
2. The Custodian has borne his burden of proving that disclosure of the requested record could jeopardize the security of the correctional facility or the persons therein, and that the record is exempt from public access under N.J.S.A. 47:1A-1.1. See also Durham v. NJ Dep’t of Corr., GRC Complaint No. 2012-35 (March 2013) and Hayes v. NJ Dep’t of Corr., GRC Complaint No. 2014-286 (May 2015). As such, the Custodian lawfully denied access to the requested record. N.J.S.A. 47:1A-6.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the
Government Records Council
On The 27th Day of June, 2017

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 30, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 27, 2017 Council Meeting**

**Kevin Alexander¹
Complainant**

GRC Complaint No. 2016-191

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Copy of a “search report that was generated on the date of 6-9-16, 4-Right, D-Wing, Bed 4-Down, by SCO Braxton.”³

Custodian of Record: John Falvey
Request Received by Custodian: June 24, 2016
Response Made by Custodian: June 24, 2016
GRC Complaint Received: July 11, 2016

Background⁴

Request and Response:

On June 24, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 24, 2016, the same day the Custodian received the request, the Custodian responded in writing, informing the Complainant that the request was denied because the requested records constitute security procedures and/or measures which, if disclosed, would jeopardize security of the facility or create a risk to the safety of persons or property pursuant to N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On July 11, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he provided the OPRA request to the Custodian on June 12, 2016, and that the Custodian denied his request on June 24, 2016. The Complainant goes into detail regarding the reasons he wants the record; specifically, he alleges a corrections officer invaded his privacy, destroyed and/or confiscated his personal

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Complainant failed to attach a copy of the OPRA request to the complaint; therefore, this description of the requested record is copied from the Records Denied List.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

property, and then falsified the search report. The Complainant states that a previous complaint was filed concerning the request which formed the basis of the instant complaint. The Complainant references GRC Complaint No. 2014-268.⁵

Statement of Information:

On July 15, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on June 24, 2016, and responded in writing on the same date. The Custodian further certifies that two (2) pages of search logs were determined to be responsive to the Complainant’s request; however, the records were not subject to disclosure.

The Custodian certifies that the agency has a responsibility to ensure that correctional facilities are free from contraband because contraband undermines the ability of corrections officers to control the activities of inmates and provide for their safety. The Custodian also certifies that correctional facilities control contraband by performing searches, the results of which are recorded in log books. The Custodian states that the Complainant is seeking such log book information, which would provide him with information concerning potential contraband search patterns that could be used to undermine security efforts. For that reason, the Custodian states that he denied access to the logs because they contain emergency or security information or procedures for a building or facility which, if disclosed, would jeopardize security of the building or facility or persons therein, pursuant to N.J.S.A. 47:1A-1.1. The Custodian also certifies that the requested records are exempt from disclosure as security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons or property under N.J.S.A. 47:1A-1.1. The Custodian cites to Fischer v. NJ Dep’t of Corr., GRC Complaint No. 2005-171 (February 2006), Cordero v. NJ Dep’t of Corr., GRC Complaint No. 2012-209 (June 2013), and Hayes v. NJ Dep’t of Corr., GRC Complaint No. 2014-286 (May 2015) in support of his argument.

Additional Submissions:

On December 19, 2016, the GRC received an undated letter from the Complainant, in which he objects to the Custodian’s SOI.⁶ The Complainant reasserts his objections to the Custodian’s denial that were already stated in the complaint. The Complainant also contends that “information about the standing of [the agency’s] search report has nothing to do with the requests that I made!”

Analysis

Timeliness

Unless a shorter time period is otherwise provided, a custodian must grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-

⁵ Upon reviewing Alexander v. New Jersey Dep’t of Corr., GRC Complainant No. 2014-268 (July 2015), the GRC has determined that said complaint is not relevant to the instant complaint.

⁶ The letter was postmarked December 14, 2016.

5(i). A custodian's failure to respond accordingly results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁷ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

The Complainant alleged that he provided the request to the Custodian on June 12, 2016, and that the Custodian denied his request ten (10) business days later on June 24, 2016. The Custodian certified that he received the Complainant's OPRA request on June 24, 2016, and that he responded in writing on the same date, denying the request. As such, there is no dispute between the parties that the Custodian responded to the request on June 24, 2016. The only date in question, therefore, is the date the Custodian received the request.

Although the Complainant stated that he provided the request to the Custodian on June 12, 2016, the evidence of record proves otherwise. The Complainant dated the request June 18, 2016. Since June 18, 2016 was a Saturday, the first business day upon which the Custodian could have possibly received the request, discounting the slow channeling of mail throughout the prison system, would have been June 20, 2016. Thus, the response to the request could not have been untimely, and since the GRC grants more weight to an unrefuted certification than to an allegation, the GRC concludes that the request was responded to on the same date it was received: June 24, 2016.

Accordingly, the Custodian's response to the Complainant's OPRA request was timely because the GRC concludes that the Custodian responded in writing to the request, denying access, on the same date the request was received. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA provides that a government record shall not include "emergency or security information or procedures for any building or facility which, if disclosed, would jeopardize security of the building or facility or persons therein[.]" and "security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software[.]" N.J.S.A. 47:1A-1.1.

⁷ A custodian's written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

In Durham v. NJ Dep't of Corr., GRC Complaint No. 2012-35 (March 2013), the complainant sought access to the daily schedules of prison staff and personnel. The custodian denied access to the records on the basis that their release would jeopardize the security of the prison. In the SOI, the custodian asserted that the schedules would reveal allocation of staff by time and location that an inmate could use to defeat security measures to conduct criminal actions, disruptive behavior, or contraband-related offenses. The Council held that:

[T]he Custodian has borne his burden of proving that the responsive daily shift schedules are exempt from disclosure as "... emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein" pursuant to N.J.S.A. 47:1A-1.1.

Id. at 5.

More recently, in Hayes v. NJ Dep't of Corr., GRC Complaint No. 2014-286 (May 2015), the complainant requested, *inter alia*, a copy of an investigation report. The custodian denied access to the report on the basis that such records were exempt from disclosure as emergency or security information or procedures which, if disclosed, would jeopardize the security of the building or facility or persons therein, pursuant to N.J.S.A. 47:1A-1.1. The Council agreed that the record should be exempt from access because disclosure could indeed jeopardize security.

Similarly to Durham, GRC 2012-35, and Hayes, GRC 2014-286, the Complainant's request here sought records that contained information which could jeopardize security procedures and/or measures in the correctional facility by, in this case, compromising the confidentiality of contraband search patterns. For that reason the Custodian denied the Complainant access to the requested records under N.J.S.A. 47:1A-1.1, as security procedures and/or measures which, if disclosed, could jeopardize security of the facility or create a risk to the safety of persons or property.

Accordingly, the Custodian has borne his burden of proving that disclosure of the requested record could jeopardize the security of the correctional facility or the persons therein, and that the record is exempt from public access under N.J.S.A. 47:1A-1.1. *See also* Durham, GRC 2012-35 and Hayes, GRC 2014-286. As such, the Custodian lawfully denied access to the requested record. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's response to the Complainant's OPRA request was timely because the GRC concludes that the Custodian responded in writing to the request, denying access, on the same date the request was received. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

2. The Custodian has borne his burden of proving that disclosure of the requested record could jeopardize the security of the correctional facility or the persons therein, and that the record is exempt from public access under N.J.S.A. 47:1A-1.1. *See also* Durham v. NJ Dep't of Corr., GRC Complaint No. 2012-35 (March 2013) and Hayes v. NJ Dep't of Corr., GRC Complaint No. 2014-286 (May 2015). As such, the Custodian lawfully denied access to the requested record. N.J.S.A. 47:1A-6.

Prepared By: John E. Stewart

June 20, 2017